Supreme Court, U.S.
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03-1184 FEB 20 2004

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

DONALD J. DIBBLE,

Petitioner,

v.

JOHN H. FENIMORE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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February 20, 2004

QUESTION PRESENTED

Are adjutants general sued in official capacity for equitable relief under 42 U.S.C. § 1983 immune from all federal constitutional and statutory claims arising incident to state military service--except facial challenges to military regulations?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES ii

OPINIONS AND ORDERS 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

ARGUMENT 3

I. The decision below conflicts with those of other circuits 3

II. The decision below conflicts with the reasoning of this Court's opinions 5

III. The holding below allowing facial challenges to regulations and individual regulatory claims, but precluding individual statutory or constitutional claims, has no basis in justiciability principles 6

Intra-military immunity 7

Issues requiring military expertise 8

Delay of availability of military assets 10

Absence of cognizable legal standard 12

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Brown v. Glines, 444 U.S. 348 (1980) 6

Chappell v. Wallace, 462 U.S. 296 (1983) 5-8,11

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 12

Crawford v. Texas Army National Guard, 794 F.2d 1034 (5th Cir. 1986) 4

Curran v. Laird, 420 F. 2d 122 (D.C. Cir. 1969) 8,9,12

Feres v. United States, 340 U.S. 135 (1950) 7

Jones v. New York State Division of Military and Naval Affairs, 166 F.3d 45 (2d Cir. 1998) 4,6,12

Jorden v. National Guard Bureau, 799 F.2d 99 (3d Cir. 1986) 3,5,13

Knutson v. Wisconsin Air National Guard, 995 F.2d 765 (7th Cir. 1993) 4,5,9,11

Kreis v. Secretary of the Air Force, 866 F.2d 1508 (D.C. Cir. 1989) 6,13

Neal v. Secretary of the Navy,
639 F.2d 1029 (3d Cir. 1981) 13

Sanders v. United States, 594 F.2d 804
(Ct. Cl. 1979) 6,11

Speigner v. Alexander, 248 F.3d 1292
(11th Cir. 2001) 4,5,7,9,11

United States v. Stanley,
483 U.S. 669 (1987) 5,7

United States ex rel. Schonbrun v.
Commanding Officer, 403 F.2d 371
(2d Cir. 1968) 4,9,10

Watson v. Arkansas National Guard,
886 F.2d 1004 (8th Cir. 1989) 4, 8

Wigginton v. Centracchio, 205 F.3d 504
(1st Cir. 2000) 3,5

Woodward v. United States, 871 F.2d
1068 (Fed. Cir. 1989) 3-4,6,10-11,13

Statutes

5 U.S.C. § 551 12

5 U.S.C. § 701 *et seq.* 12

5 U.S.C. § 7102 2

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331	3
28 U.S.C. § 2671 *et seq.*	7
32 U.S.C. § 709	2
32 U.S.C. § 709(f)	2
42 U.S.C. § 1983	2

OPINIONS AND ORDERS

The decision below, App. 1a, is reported at 339 F.3d 120. The appellate court's denial of rehearing, App. 42a, is unreported. The district court's initial decision, App. 17a, is reported at 84 F.Supp.2d 315. The district court's unreported denial of reconsideration, App. 35a, appears at 2000 U.S. Dist. LEXIS 9240.

JURISDICTION

The judgment sought to be reviewed was entered August 8, 2003. The court below denied rehearing November 24, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I (excerpt)

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

5 U.S.C. § 7102 (excerpt)

Each employee shall have the right to form, join, or assist any labor organization . . . freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right . . . to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the

labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities.

32 U.S.C. § 709(f) (excerpt)

[A] . . . suspension . . . shall be accomplished by the adjutant general.

42 U.S.C. §1983 (excerpt)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Dibble, a former member of the New York Air Guard and former federal excepted service technician employed by the Air Guard under 32 U.S.C. § 709, sued the New York Adjutant General, in official capacity, for equitable relief under 42 U.S.C. § 1983. Dibble claimed that the Air Guard denied him reenlistment in retaliation for his exercise, during civilian technician employment, of (1) his right under 5 U.S.C. § 7102 to assist and to act for a labor organization; (2) his right under 32 U.S.C. § 709(f) to appeal (successfully) his suspension from employment; and (3) his First Amendment rights to (a) associate with fellow civilian employees in a union, (b) petition for redress, and

in furtherance of his and fellow employees' rights in a non-disruptive manner expressly authorized by federal law.[1] The district court had federal question jurisdiction under 28 U.S.C. § 1331.

The district court, denying Fenimore's motion to dismiss, held Dibble's claims justiciable. App. 26a, 40a. Fenimore appealed immediately, asserting intra-military immunity. The Court of Appeals sustained the immunity claim, holding that only facial challenges to, or violations of, military regulations are justiciable. App. 14a, 15a.

ARGUMENT

I

The decision below conflicts with those of other circuits

As the court below acknowledged, App. 11a-12a, its decision conflicts with *Wigginton v. Centracchio*, 205 F.3d 504, 512 (1st Cir. 2000) ("intramilitary suits alleging constitutional violations but not seeking damages are justiciable"); and *Jorden v. National Guard Bureau*, 799 F.2d 99, 108-111 (3rd Cir. 1986) (discharge of National Guard member in retaliation for exercise of First Amendment rights may be equitably redressed). The decision below also conflicts with *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989) (release of Reserve

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[1] Dibble also sued the Secretary of the Air Force, in official capacity, seeking review of the Air Force Board for Correction of Military Records decision that refused relief from the simultaneous denial of Dibble's federal military reenlistment. Dibble's claim against the Secretary was not at issue in the court below. It remains before the district court.

officer from active duty under 10 U.S.C. § 681(a) subject to judicial review upon claim that release was unconstitutionally motivated).

The lower court said it found "more persuasive" decisions reasoning that only facial challenges to military regulations are justiciable. App. 13a-14a, *citing Knutson v. Wisconsin Air National Guard*, 995 F.2d 765, 771 (7th Cir. 1993); *Watson v. Arkansas National Guard*, 886 F. 2d 1004, 1008-10 (8th Cir. 1989); *Crawford v. Texas Army National Guard*, 794 F.2d 1034, 1036 (5th Cir. 1986). *See also*, *Speigner v. Alexander*, 248 F.3d 1292, 1297 (11th Cir. 2001) (same).

These decisions, however, conflict with the Second Circuit's own decision in *Jones v. New York State Division of Military and Naval Affairs*, 166 F.3d 45, 52 (2d Cir. 1998), which held that a state Guard member may obtain injunctive relief from the military's violation of its own regulations.[2]

The question presented involves interests of exceptional importance--military need and the enforcement of constitutional rights. The Court should resolve the conflict among the circuit courts over this important question.

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[2] The *Jones* decision, to the extent it deems justiciable any claim alleging failure to follow military regulations, conflicts with *United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371, 374-375 (2d Cir. 1968) (claim of regulatory violation nonjusticiable if interpretation of regulation requires military expertise).

II

The decision below conflicts with the reasoning of this Court's opinions

The ruling below is inconsistent with the reasoning of *Chappell v. Wallace*, 462 U.S. 296 (1983), and *United States v. Stanley*, 483 U.S. 669 (1987). In holding servicemembers' individual capacity suits for damages to be nonjusticiable, both decisions distinguished official capacity suits for equitable relief. *Chappell*, 462 U.S. at 303, 304 (military correction board decision denying military promotion subject to judicial review; Court has "never held . . . that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service"); *Stanley*, 483 U.S. at 683 ("redress designed to halt or prevent the constitutional violation" distinguishable from "award of money damages").

Contrary to the opinions in *Chappell* and *Stanley*, the court below and other appellate courts[3] have held that official capacity suits for injunctive relief are not distinguishable, for purposes of justiciability, from individual capacity suits for damages. The First, and Third Circuits, however, have recognized the distinction. *Wigginton v. Centracchio*, 205 F.3d 504 (1st Cir. 2000); *Jorden v. National Guard Bureau*, 799 F.2d 99 (3rd Cir. 1986). The court below recognized the distinction as to claims alleging violations of military regulations. App.

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[3] *Speigner v. Alexander*, 248 F.3d 1292, 1297 (11th Cir. 2001) *Knutson v. Wisconsin Air National Guard*, 995 F.2d 765, 771 (7th Cir. 1993); *Watson v. Arkansas National Guard*, 886 F. 2d 1004, 1008 (8th Cir. 1989).

15a, *citing Jones v. New York State Division of Military and Naval Affairs*, 166 F.3d 45 (2d Cir. 1998).

The decision below identified no reasoning in *Chappell* or *Stanley* precluding equitable claims except facial challenges to, or alleged violations of, military regulations. There is none to be found. In *Brown v. Glines*, 444 U.S. 348, 357 n. 15 (1980), the Court said permissible claims are not limited to facial challenges. Military correction board cases approved by the *Chappell* opinion, 462 U.S. at 303, typically concern individual complaints, not facial challenges, and often present constitutional and statutory claims, not just violations of military regulations. *See, e.g., Kreis v. Secretary of the Air Force*, 866 F.2d 1508 (D.C. Cir. 1989); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989); *Sanders v. United States*, 594 F.2d 804 (Ct. Cl. 1979).

III

The holding below allowing facial challenges to regulations and individual regulatory claims, but precluding individual statutory or constitutional claims, has no basis in justiciability principles

Courts properly have recognized four grounds upon which a challenge to military action can be deemed to be nonjusticiable. None of these grounds applies here. And none is related to whether the challenge attacks a military regulation on its face or concerns an individual decision, or claims violation of a military regulation rather than violation of a statute or the Constitution.

Intra-military immunity

Intra-military immunity applies to damages claims brought by military members against other military members in their individual capacities. *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (intra-military immunity precludes "exposing officers to personal liability at the hands of those they are charged to command").[4] In *Chappell* the Court expressly recognized that suits for equitable relief by military members against military officials sued in their official capacities--such as cases against military service heads challenging separation from the military or denial of military promotion--are not precluded. 462 U.S. at 303, 304.[5] In *United States v. Stanley*, 483 U.S. 669 (1987), the Court followed *Chappell*. The Court held intra-military damages actions barred, but

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[4] Intra-military immunity results in servicemembers being unable to sue the federal government for damages for torts committed by other servicemembers, *Feres v. United States*, 340 U.S. 135 (1950), but this is not because intra-military immunity, itself, extends to the federal government. Rather, it is because the federal government has sovereign immunity from tort damages suits to the extent that immunity is not waived by the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 *et seq*. Because the FTCA makes the United States liable only where the federal tortfeasor would be personally liable, and intra-military immunity precludes personal liability, the United States cannot be held liable in damages for intra-military torts.

[5] Contrary to the Eleventh Circuit's view, the *Chappell* holding is not based on deference "to the military establishment." *Speigner v. Alexander*, 248 F.3d 1292, 1297 (11th Cir. 2001). Rather, it is based on the need to protect military personnel from "personal liability." *Chappell*, 462 U.S. at 304. This protection is necessary because "the need for unhesitating and decisive action . . . would be undermined by . . . exposing officers to personal liability." *Id.* This point is inapplicable to official capacity suits.

echoed *Chappell*'s distinction between "redress designed to halt or prevent the constitutional violation" and "award of money damages." 483 U.S. at 683.[6]

Because intra-military immunity precludes only individual capacity damages suits, not official capacity equitable claims, the doctrine does not address different types of equitable claims. Whether an official capacity equitable action presents a facial challenge; attacks an individual decision; or claims violation of a regulation, statute, or the Constitution is irrelevant.

Issues requiring military expertise

A second ground on which a challenge to a military decision may be held nonjusticiable is lack of judicial competence to decide the specific question presented, because the question requires military expertise. This principle can apply in suits by civilians as well as military members. The decision in *Curran v. Laird*, 420 F.2d 122 (D.C. Cir. 1969), illustrates the point. There, the court held that whether reserve fleet vessels were "available" to transport military cargo, within the meaning of a statute requiring that available domestic vessels be used before foreign vessels, was nonjusticiable because the issue was

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[6] In declining to recognized the distinction drawn in *Chappell* and *Stanley* between damages actions and official capacity suits for equitable relief, the court in *Watson v. Arkansas National Guard*, 886 F. 2d 1004, 1008 (8th Cir. 1989), erroneously reasoned that "[t]he judiciary does not acquire competence in this area merely because the remedy sought is an injunction rather than damages." Contrary to the *Watson* court's assumption, intra-military immunity from damages is not based on lack of judicial competence to adjudicate all constitutional or federal statutory claims that arise incident to military service. Rather, intra-military immunity from damages is based on the need to protect service members from personal liability. *Chappell*, 462 U.S. at 304.

one of a "narrow band of matters" involving "decisions relating to the conduct of national defense" in which "the national interest contemplates and requires flexibility in management of defense resources" and "the particular issues call for determinations that lie outside sound judicial domain in terms of aptitude, facilities, and responsibility." 420 F.2d at 131, 129. *See also United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371, 374-375 (2d Cir. 1968) ("while the regulations wisely give . . . specific content to [the hardship exemption from military service], a good deal is necessarily left to the judgment of the commanding officer"; "administration of the hardship exemption necessarily involves a balancing of the individual's claims against the nation's needs, and the balance may differ from time to time and from place to place in a manner beyond the competence of a court to decide").[7]

Application of the *Curran* principle does not depend on whether the plaintiff presents a facial challenge; attacks an individual decision; or claims violation of a regulation, statute, or the Constitution. Any of these kinds of cases might raise specific issues requiring military expertise beyond judicial competence.

The *Curran* principle does not apply to Dibble's suit. Dibble does not claim that he was denied reenlistment

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[7] The *Curran* principle, as noted, applies only to the "narrow band of matters" that require military expertise, *Curran*, 420 F.2d at 131; *Schonbrun*, 403 F.2d at 374-375, not to all service-related claims. Courts properly "defer to the superior experience of the military in matters of duty orders, promotions, demotions, and retentions," *Speigner*, 248 F.3d at 1298, *quoting Knutson v. Wisconsin Air National Guard*, 995 F.2d 765, 771 (7th Cir. 1993), when they decline to decide specific issues that require military expertise.

based on unsound military judgment. He claims that the decision was not based on military judgment at all--that he was denied reenlistment in retaliation for exercise of First Amendment and federal statutory rights. Adjudication of these claims requires no military expertise. It does not involve review of the wisdom of military opinions.

Delay of availability of military assets

A third ground on which a challenge to a military decision may be held nonjusticiable is where adjudication would delay availability of military assets. *United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371, 374-375 (2d Cir. 1968) ("delay in the call-up of a reservist, even during the period necessary for judicial consideration of his claim to discretionary exemption, inevitably means . . . a gap in the unit").[8] The *Schonbrun* principle does not apply to suits, like Dibble's, which challenge military separations rather than call-up orders. Dibble's claims, if successful, would not deprive the military of assets, and adjudication of his claim therefore would not delay availability of military assets. The United States Court of Federal Claims routinely reviews military separation cases, and has authority to order reinstatement. *Woodward v. United States*, 871 F.2d 1068

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[8] Although a "gap in the unit" might be avoided by "call of another reservist who otherwise might not have been reached," *id.*, the gap would not be avoided if that other reservist also challenged the call-up decision. Allowance of Schonbrun's claim would allow class action challenges to call-up decisions, making gaps in the units unavoidable. In this setting, adoption of the Eleventh Circuit's "facial challenges only" rule, instead of the *Schonbrun* principle, would have a perverse effect, since facial challenges to military regulations affect large numbers of servicemembers, threatening greater deprivation of military resources than a challenge applicable only to one plaintiff.

(Fed. Cir. 1989); *Sanders v. United States*, 594 F.2d 804 (Ct. Cl. 1979).[9]

Because reinstatement is an available remedy in correction board cases--like *Woodward* and *Sanders*--there is no reason to withhold this remedy in other official capacity military suits. The point has particular applicability to reinstatement suits by former National Guard members like Dibble, because separation from the Guard simultaneously severs both federal and state military membership. A rule allowing judicial restoration of the former, but not the latter, would be meaningless, and have no basis in justiciability principles.[10]

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[9] On this point, the court in *Knutson v. Wisconsin Air National Guard*, 995 F.2d 765 (7th Cir. 1993), erroneously reasoned that, because military reinstatement claims can require years to litigate, military separation in violation of the Constitution should be tolerated. The idea that the military cannot "staff properly," maintain "operational readiness," or properly conduct "training programs" while it "await[s]" the outcome of reinstatement litigation, *Knutson*, 995 F.2d at 771, is absurd. The mere filing of reinstatement litigation does not require the military to change its staffing, operations, or training. And even if the possibility of future reinstatement of an unconstitutionally-separated service member could be deemed to "significantly hamper" current staffing and mission accomplishment, *id.*, this possibility would not be a rational reason to allow facial challenges to military regulations, while disallowing challenges to individual personnel decisions. Simultaneous reinstatement of tens of thousands of members incident to judicial invalidation of an unconstitutional military regulation would cause far greater change in military staffing and operations than reinstatement of a single individual.

[10] Contrary to the *Speigner* court's opinion, 248 F.3d at 1296, official capacity suits for military reinstatement do not "tamper with the established relationship between enlisted military personnel and their superior officers," *Chappell v. Wallace*, 462 U.S. 296, 300 (1983), because these suits do not subject military officers to personal liability. *Chappell*, 462 U.S. at 304.

Absence of cognizable legal standard

A fourth ground on which a challenge to a federal military decision may be held nonjusticiable arises under the review provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, which apply to federal agencies generally, including the military. 5 U.S.C. § 551. Claims which challenge discretionary decisions, and which are not founded on either the Constitution or a statute or regulation embracing a cognizable legal standard, are unreviewable because they concern matters "committed to agency discretion" under 5 U.S.C. § 701(a)(2). *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 409 (1971) (agency decision is "committed to agency discretion" where there is "no law to apply").[11]

Dibble's claims against Fenimore do not concern matters that would be deemed committed to agency discretion under the APA if they concerned federal, rather than state, military membership. Dibble's claims are based on the First Amendment and a federal statute that embraces cognizable legal standards affording federal employees rights to serve as union representatives. These claims are justiciable. *Jones v. New York State Division of Military and Naval Affairs*, 166 F.3d 45, 52 (2d Cir. 1998) (holding justiciable Guard member's claim for injunctive relief from New York State military's violation of its own regulation);

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[11] The *Curran* court invoked this principle. 420 F.2d at 128. *Curran*, however, was decided before this Court's decision in *Citizens to Preserve Overton Park*. Under the latter decision, a statute requiring use of an "available" resource states a cognizable legal standard. 401 U.S. at 409. The point in *Curran* that remains valid after *Citizens to Preserve Overton Park* is that claims under an otherwise cognizable legal standard are nonjusticiable if interpretation or application of the standard requires military expertise beyond judicial competence.

Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989) (release of Reserve officer from active duty under 10 U.S.C. § 681(a) subject to judicial review upon claim that release was unconstitutionally motivated); *Kreis v. Secretary of the Air Force*, 866 F.2d 1508 (D.C. Cir. 1989) (denial of military promotion reviewable for statutory violations); *Jorden v. National Guard Bureau*, 799 F.2d 99, 108-111 (3rd Cir. 1986) (discharge of National Guard member in retaliation for exercise of First Amendment rights may be equitably redressed); *Neal v. Secretary of the Navy*, 639 F.2d 1029, 1041 n. 11, 1044 (3d Cir. 1981) (absence of right to reenlist does not preclude judicial review of enlistment denial where statutory standard was violated).

Whether a claim is based on a cognizable legal standard does not depend on whether the standard is found in a regulation, a statute, or the Constitution. Nor does it depend on whether the claim challenges a military regulation on its face or challenges an individual decision.

None of the four bases of the nonjusticiability doctrine applies to Dibble's claims. None of the differences between facial challenges to regulations and challenges to individual decisions has any bearing on justiciability. The holding below that individual claims based on military regulations are justiciable, but individual claims based on statutes or the Constitution are not, is unexplained and inexplicable.

The decision below is an arbitrary minimization of military suits, not a reasoned application of justiciability principles.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 20, 2004

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ON PETITION FOR WRIT OF CERTIORARI
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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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February 20, 2004 — *Counsel of Record for Petitioner*

TABLE OF CONTENTS

A	Opinion of the Court of Appeals August 8, 2003 (Leval, J.) (holding, on interlocutory appeal, that intra-military immunity bars former state military member's federal constitutional and statutory claims under 42 U.S.C. § 1983 against state Adjutant General sued in official capacity for equitable relief, unless claim is facial challenge to, or asserts failure to follow, military regulation)	1a
B	District Court decision January 19, 2000 (Kahn, J.) (upholding justiciability of equitable claim alleging denial of state military reenlistment in retaliation for exercise of federal constitutional and statutory rights)	17a
C	District Court decision July 5, 2000 (Kahn, J.) (denying Adjutant General's motion for reconsideration of January 19, 2000 decision)	35a
D	Order by Court of Appeals November 24, 2003 denying petition for rehearing	42a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2000
(Argued: February 14, 2001 Decided: August 8, 2003)
Docket No. 00-6243

DONALD J. DIBBLE,

Plaintiff-Appellee,

-v.-

JOHN H. FENIMORE, V, MAJOR GENERAL,
NEW YORK AIR NATIONAL GUARD,

Defendant-Appellant,

SECRETARY OF THE AIR FORCE F. WHITTEN
PETERS,

Defendant.

Before:

KEARSE, LEVAL AND KATZMANN,
Circuit Judges.

Former National Guard member sued the commander of the New York State Air National Guard, claiming that he was unlawfully discharged in retaliation for his

constitutionally protected activities as a union steward. The United States District Court for the Northern District of New York (Kahn, *J.*) denied defendants' motion to dismiss. State Defendant brought an interlocutory appeal challenging the denial of the motion to dismiss. The Court of Appeals (Leval, *J.*) holds that (a) the interlocutory order denying the defendant's motion to dismiss was immediately appealable as a collateral order covered by *Cohen v. Industrial Beneficial Loan Corp.*, 337 U.S. 541 (1949), and (b) the commander of the New York Air National Guard was immune from suit under *Feres v. United States*, 340 U.S. 135 (1950). REVERSED and REMANDED with direction to dismiss the action.

MICHAEL S. BUSKUS, Assistant Solicitor General, for Eliot Spitzer, Attorney General of the State of New York (Nancy A. Spiegel, Assistant Solicitor General; Peter H. Schiff, Senior Counsel, *on the briefs*), Albany, New York, for *defendant-appellant*.

DANIEL M. SCHEMBER, Gaffney & Schember, P.C., Washington, D.C., for *plaintiff-appellee*.

LEVAL, *Circuit Judge*:

Defendant-appellant John Fenimore is Major General and Commander of the New York Air National Guard ("Air Guard" or "Guard"). Plaintiff-appellee Donald J. Dibble was a staff sergeant with the Air Guard.[1] In late 1994,

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[1] Dibble's staff sergeant position is classed as federally excepted civilian employment. Dibble was required by 32 U.S.C. § 709(b) to maintain military membership in the Air Guard as a condition of this employment.

Dibble was ordered honorably discharged from the Guard and denied the opportunity to re-enlist.[2] Following his dismissal (and the unsuccessful pursuit of various intra-military administrative remedies), Dibble brought this action in the United States District Court for the Northern District of New York (Kahn, *J.*), claiming that he was unlawfully denied re-enlistment in retaliation for his constitutionally and statutorily protected activities as a union steward.[3] Fenimore moved to dismiss, arguing, inter alia, that Dibble's claims were non-justiciable under the doctrine of intra-military immunity. The district court denied the motion and on reconsideration, adhered to its decision. Fenimore brought this appeal.[4]

This case presents two issues: (1) whether the interlocutory order denying the motion of the Commander of the State National Guard to dismiss the suit by reason of the doctrine of intra-military immunity is immediately appealable under the collateral order rule of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); and

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[2] The stated reason for Dibble's dismissal was his "performance in a military capacity."

[3] Specifically, Dibble alleges that he was dismissed as a result of his exercise of (1) his right under 5 U.S.C. § 7102 to assist and act for a labor organization; (2) his right under 32 U.S.C.§ 709(e)(5) (since recodified as 32 U.S.C. § 709(f)(4) and Technician Personnel Regulation (TPR) 752 § 2-17, Element 6(b), to appeal (successfully) his thirty-day suspension from employment; and (3) his First Amendment right to associate in a union and to speak freely in furtherance of his and fellow employees' rights.

[4] The suit also named the Secretary of the United States Air force. As to that defendant, the district court remanded the case to the Air Force Board for the Correction of Military Records for administrative proceedings. Those proceedings are still pending.

(2) if so, whether such a suit is non-justiciable under the doctrine of intramilitary immunity. For the reasons set forth below, we conclude that (1) the district court's order was immediately appealable and (2) that defendant's motion to dismiss should have been granted.

DISCUSSION

A. Appealability

Interlocutory orders of federal district courts are not ordinarily appealable until the rendition of a final decision. *See* 28 U.S.C. § 1291. A "final decision" is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). An order denying a defendant's motion to dismiss on the grounds of intramilitary immunity is certainly not "final"; indeed, such an order "ensures that litigation will continue in the District Court." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275 (1988). In limited circumstances, however, federal appellate courts may review nonfinal orders. For example, under the collateral order rule of *Cohen*, appeals may be taken in "that small class which finally determines claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* at 546.

District court orders denying claims of immunity are at times held appealable, because, as appellant notes, immunity is intended to shield the defendant not only from an adverse outcome, but also from the burden of having to

go through the litigation process at all. As the Supreme Court has observed with respect to a state officer's immunity from a suit alleging a constitutional tort under 42 U.S.C. § 1983, the defense is "an immunity from suit rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). This court has applied the collateral order rule to permit appeals from district court orders denying a wide variety of immunity claims. *See, e.g., Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp.*, 204 F.3d 384, 387 (2d Cir. 2000) (Foreign Sovereign Immunities Act immunity); *Baker v. Coughlin*, 77 F.3d 12, 14 n.2 (official immunity under state law); *Goldberg v. Town of Rocky Hill*, 973 F.2d 70, 72 (2d Cir. 1992) (municipal immunity); *Smith v. Reagan*, 841 F.2d 28, 30 (2d Cir. 1988) (Eleventh Amendment immunity); *Barrett v. United States*, 798 F.2d 565, 570-71 (2d Cir. 1986) (prosecutorial immunity). *But see In re "Agent Orange" Prod. Liab. Litig.*, 745 F.2d 161, 162 (2d Cir. 1984) (rejecting an interlocutory appeal from an order denying a defense of intramilitary immunity).

Under the collateral order rule, a prejudgment order is eligible for immediate interlocutory appeal if it satisfies three criteria: It "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable [upon the eventual] appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). The orders appealed in this case satisfy these three standards. First, there is no dispute that they "conclusively determine" the availability of the immunity defense. Second, the immunity question is separate from

the merits of the action.[5] And as to the third requirement, we conclude that the interlocutory order is "effectively unreviewable" on appeal from a final judgment because an important element "of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985) (citing *Nixon v. Fitzgerald*, 457 U.S. 731 (1982)). The defendant would irrevocably lose this benefit of immunity if obligated to defend the case at trial.

The Supreme Court appears to take this view of the nature of the right, at least with respect to claims of immunity made by officers in the active U.S. military. In *United States v. Stanley*, 483 U.S. 669 (1987), the Court suggested that the process of defending a lawsuit, not merely the end result, compromises military discipline and thus gives rise to immunity. Concerned by the prospect of "compelled depositions and trial testimony by military officers concerning the details of their military commands," the *Stanley* court explained that if a subordinate were allowed to prosecute a lawsuit against his superior officer, "the mere process of arriving at correct conclusions would disrupt the military regime." *Stanley*, 483 U.S. at 682-83. *See also Stencel Aero Eng'g Corp. v. United States*, 431

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[5] The factual record on appeal is somewhat spare, making it difficult to assess whether there are any material facts genuinely in dispute that would bear on the applicability of intramilitary immunity. As this court has noted previously, "[w]here . . . resolution of the immunity defense requires the adjudication of issues of fact that are inseparable from the merits, the denial is not immediately appealable." *Tolbert v. Queens College*, 164 F.3d 132, 138 (2d Cir. 1999); *see also Behrens v. Pelletier*, 516 U.S. 299, 312-13 (1996); *Johnson v. Jones*, 515 U.S. 304, 313 (1995). The pleadings are, however, clear enough for us to conclude with relative confidence that the availability of an immunity does not turn on the resolution of any disputed questions of fact.

U.S. 666, 673 (1977) ("The trial would . . . involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions."). We see no reason why this logic would apply with any less force to claims brought by members of the National Guard. *See Jones v. N.Y. State Div. of Military & Naval Affairs*, 166 F.3d 45, 51 (2d Cir. 1999) ("Absent some reasoned distinction, justiciability of constitutional tort actions incident to federal and state military service should be co-extensive.").

Intramilitary immunity is designed to protect a defendant from the obligation to participate in the litigation, and not merely from an adverse result. The loss of such a benefit cannot be vindicated by appeal from an adverse final judgment. Were we required to refrain from hearing an appeal of an interlocutory order denying a claim of intramilitary immunity, the benefit claimed by the defendant (freedom from the burden of suit) would be irrevocably lost by the time we were able to hear his claim.

We are mindful of our decision in *In re "Agent Orange" Product Liability Litigation*, 745 F.2d 161, in which we declined to exercise jurisdiction over an interlocutory appeal challenging an order denying dismissal on intramilitary immunity grounds. However, we believe *Agent Orange* to be both distinguishable on its facts and in large part superceded by subsequent decisions of the Supreme Court. As to the facts, the order appealed from in *Agent Orange* was "tentative" in its wording, thus raising doubt whether it "conclusively determined" the question of immunity. *Id.* at 163-64. Furthermore, *Agent Orange* relied on an understanding of the intramilitary immunity doctrine since rejected by the Supreme Court. We held in *Agent Orange* that intramilitary immunity was "inextricably